Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1242

TIFFANY CONSTRUCTION CO., INC.,
Petitioner,
v.
BUREAU OF REVENUE, STATE OF NEW MEXICO
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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February 12, 1980

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IN THE

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TIFFANY CONSTRUCTION CO., INC.,
Petitioner,
v.
BUREAU OF REVENUE, STATE OF NEW MEXICO
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

TIFFANY CONSTRUCTION CO., INC., the Petitioner herein, prays that a Writ of Certiorari be issued to review the Opinion of the New Mexico Court of Appeals, entered on October 19, 1978. The Supreme Court of the State of New Mexico denied a Petition for a Writ of Certiorari to review this Opinion on November 14, 1979.

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of New Mexico is reported at the State Bar of New Mexico Bulletin and Advance Opinions, Vol. 18, No. 50, December 13, 1979, and printed in Appendix "A" hereto, infra, p. 13. The New Mexico Supreme Court denied the Petitioner's Petition for a Writ of Certiorari in an Order without an Opinion, which is unreported, which appears at Appendix "B", infra, p. 18. The Decision of the District Court for Santa Fe County, which was affirmed by the Court of

Appeals of the State of New Mexico, is unreported and appears at Appendix "C", infra, p. 19.

JURISDICTION

The Order of the Supreme Court of the State of New Mexico, Appendix "B", infra, p. 18 was entered on November 14, 1979. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C.A. § 1257 (3).

QUESTIONS PRESENTED

TIFFANY CONSTRUCTION CO., INC., an Arizona corporation, brought suit in the New Mexico District Court for the County of Santa Fe, pursuant to § 7-1-26 N.M.S.A. 1978, seeking a refund of $78,583.03 in gross receipts taxes paid to the New Mexico Bureau of Revenue. The questions thereby arising are:

i. Can a non-Indian, foreign corporation be taxed for "doing business" in the State of New Mexico by the State of New Mexico, pursuant to the New Mexico Gross Receipts and Compensating Tax Act, Sections 7-9-1 to 7-9-81 N.M.S.A. 1978, for work done on the Navajo Indian Reservation, when all of its activities are conducted either in a foreign state or on the Reservation, and when employees of the foreign corporation enter the Reservation from the Arizona side of the Reservation and never enter non-Indian land in the State of New Mexico?

ii. Can a non-Indian, foreign corporation, which has contracted with the Bureau of Indian Affairs to grade and drain a section of "Indian road" maintained by the Bureau of Indian Affairs, be taxed by the State of New Mexico, when it receives no benefits from the State of New Mexico?

iii. Is the New Mexico taxation of non-Indians, doing work to be financed by Indians, a State infringement on the right of reservation Indians to make their own laws and to be ruled by them?

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment 14, Section 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

TREATY INVOLVED

The Treaty of 1868 between the United States of America and the Navajo Tribe of Indians, concluded June 1, 1868; Ratification advised July 25, 1868; proclaimed August 12, 1868 (15 Stat. 667). This treaty is printed in Appendix "D", infra, p. 26.

STATEMENT OF THE CASE

Petitioner, TIFFANY CONSTRUCTION CO., INC., is an Arizona corporation with its principal office in Phoenix, Arizona. It conducts a vast majority of its business within the boundaries of the State of Arizona. TIFFANY CONSTRUCTION CO., INC. is not authorized to do business within the State of New Mexico, nor is it licensed to do business in New Mexico. It has never maintained an office in New Mexico. TIFFANY CONSTRUCTION CO., INC. entered into a construction contract dated October 4, 1974 with the Navajo Tribe and the Bureau of

Indian Affairs to furnish all labor, equipment, and materials to grade and drain 20.719 miles of roadway, including the building of culverts and cattle passes, and reseeding along the entire project. This roadway was to stretch from the Arizona border into the Navajo Reservation lands only. The approximate amount of the construction contract was $1,681,740. The construction project in which TIFFANY CONSTRUCTION CO., INC. was engaged was located entirely on the Navajo Indian Reservation and began approximately seven miles south of Shiprock, in San Juan County, New Mexico, at a point on U.S. Highway 666 and extended westerly 20.719 miles to the New Mexico-Arizona state line, near Red Rock, Arizona, on the Navajo Reservation. The contract for the project was signed in Arizona, and the project was bonded through Arizona companies. No New Mexico subcontractors were used on the project. The materials for the project were obtained on the Navajo Reservation. Employees on the project were either Arizona residents or Navajo Indians. In order to construct the road which was the subject of the construction contract, the employees of the Petitioner, TIFFANY CONSTRUCTION CO., INC., and all of its construction equipment entered the State of New Mexico from Arizona on State Highway 504 and traversed along U.S. Highway 666 to the construction site which was entirely within the Navajo Reservation. The Arizona employees stayed on the site in trailers owned by the employees and never left the Reservation. Having entered the New Mexico portion of the Reservation, both employees and equipment of TIFFANY CONSTRUCTION CO., INC. never passed any New Mexico weighing stations. Arizona Workmen's Compensation was provided to employees, as were unemployment benefits under Arizona law. TIFFANY CONSTRUCTION CO.,

INC. used no police or fire protection provided by the State of New Mexico while on the job, since none was available to it. It also never utilized New Mexico health services, educational services, or law enforcement services at any time while engaged in construction of the road on the Indian Reservation. TIFFANY CONSTRUCTION CO., INC. and its employees received no benefits from the State of New Mexico while it was engaged in the construction project on the Navajo Indian Reservation. The Bureau of Revenue of the State of New Mexico assessed a tax levy in the amount of $78,583.03 upon TIFFANY CONSTRUCTION CO., INC. as gross receipts taxes and interest under the New Mexico Gross Receipts and Compensating Tax Act, Sections 7-9-1 to 7-9-81, N.M.S.A. 1978. Of the total amount, $32,343.02 was paid under a Bureau of Revenue assessment, which included a penalty. TIFFANY CONSTRUCTION CO., INC. protested the penalty, pursuant to § 7-1-24 N.M.S.A. 1978, although it did not protest the principal assessed. The Commissioner of the New Mexico Bureau of Revenue held that the penalty was due and owing, and this decision was appealed to the New Mexico Court of Appeals, which upheld the tax penalty in the case of *Tiffany Construction Co., Inc. vs. Bureau of Revenue,* 90 N.M. 16, 558 P. 2d 1155 (1976), Cert. denied, 90 N.M. 255 (1976). The sum of $46,240.01 was paid to the New Mexico Bureau of Revenue by TIFFANY CONSTRUCTION CO., INC., as a self-assessment, but under protest. In the present case, TIFFANY CONSTRUCTION CO., INC. sought a refund of the entire amount of $78,583.03, pursuant to § 7-1-26 N.M.S.A. 1978. This refund was denied by the District Court of Santa Fe County on July 13, 1978. See Judgment, infra, Appendix "C." TIFFANY CONSTRUCTION CO., INC. appealed the decision of the District Court. The issues on appeal were as follows:

1. There was no waiver of the TIFFANY CONSTRUCTION CO., INC.'s right to pursue the remedy of claiming a tax refund, pursuant to § 7-1-26 N.M.S.A. 1978, for the tax paid under the State's assessment, because TIFFANY CONSTRUCTION CO., INC. protested the assessment of the penalty for originally not paying the assessment, pursuant to Section 7-1-24 N.M.S.A. 1978.

2. Assessment of the gross receipts tax against TIFFANY CONSTRUCTION CO., INC., was in violation of the 14th Amendment of the United States Constitution.

The New Mexico Court of Appeals affirmed the Opinion of the District Court. TIFFANY CONSTRUCTION CO., INC. petitioned the Supreme Court of the State of New Mexico for a Writ of Certiorari, which was denied on November 14, 1979.

The basis for federal jurisdiction in the Supreme Court of the United States is that the Petitioner claims that the assessment of a gross receipts tax against TIFFANY CONSTRUCTION CO., INC., for construction services performed solely on the Navajo Reservation, was in violation of the 14th Amendment of the United States Constitution, because TIFFANY CONSTRUCTION CO., INC. had absolutely no relationship with the State of New Mexico during the entire one-year period that it was engaged in this project. A further basis of federal jurisdiction is that the assessment of the gross receipts tax against TIFFANY CONSTRUCTION CO., INC. was a violation of the Treaty of 1868 between the United States of America and the Navajo Tribe of Indians because the tax interferes with the Navajos' self-government, as granted by said Treaty, and infringes on their right to make their own laws and be ruled by them. If the decision of the New Mexico Court

of Appeals is not reversed by the United States Supreme Court, the Navajo Tribe will be directly affected by having to pay higher prices for goods and services in projects on the Reservation for which they are a contracting party.

REASONS FOR GRANTING THE WRIT

1. The decision of the New Mexico Court of Appeals conflicts with the due process principles ennunciated in this Court's Opinion in *State of Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940).

In *State of Wisconsin v. J. C. Penney Co.*, this Court stated that the basic test of state jurisdiction to tax was:

> "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. 311 U.S. 444

The question in the present case is whether a foreign corporation, not licensed to do business in the State of New Mexico, which enters a part of the Navajo Reservation, which is located in New Mexico, from that part of the reservation which is located in Arizona, and never leaves Reservation land to enter non-Reservation land in the State of New Mexico, should be subject to New Mexico's Gross Receipts and Compensating Tax, Sections 7-9-1 to 7-9-81, N.M.S.A. 1978, when it has no contact with the State of New Mexico, and receives no benefits from the State. It is the position of TIFFANY CONSTRUCTION CO., INC. that the facts of the present case do not meet the test of *State of Wisconsin v. J. C. Penney Co.*, supra. The present case can be distinguished from the New Mexico case

of *G. M. Shupe, Inc. v. Bureau of Revenue,* 89 N.M. 265, 550 P.2d 277 (1976). That case also concerned the assessment of a gross receipts tax against a foreign corporation which constructed a dam on the Nambe Pueblo. The corporation challenged the tax on the basis of the due process clause of the Fourteenth Amendment of the United States Constitution, among other reasons. The New Mexico Court of Appeals, in the *G. M. Shupe* case, stated that:

> "The State's ability to tax this taxpayer is not controlled by the lack of benefits given the Nambe Indians, since the taxpayer received benefits from the State while present here." Id. at 269.

The Court of Appeals did not discuss the benefits which were received by the foreign corporation, while it was in New Mexico. In the *Shupe* case, unlike the present case, there were no findings that the employees of the foreign corporation never left Indian land. The Nambe Pueblo, unlike the gigantic Navajo Reservation, is totally within the State of New Mexico. Thus, the likelihood of *Shupe* and its employees receiving benefits from the State of New Mexico was far greater than it is in the present case.

The present case is also distinguishable from *Mescalero Apache Tribe v. Fred O'Cheskey,* 439 F. Supp. 1063 (D. N.M. 1977). In that case, foreign corporations constructed both a housing project and a hotel and resort complex on the Mescalero Apache Reservation. The State of New Mexico had also assessed gross receipts taxes against the foreign corporations. In the *Mescalero* case, the defense of violation of due process was not raised. However, the Federal District Court stated, in the way of dictum, that:

> "at the very least, the contractors were accorded benefits by their protection from the State as they went to and from the reservation." Id. at 1063.

Like the New Mexico Court of Appeals in the *Shupe* case, the United States District Court for the District of New Mexico did not specify what these "benefits" were. The Mescalero Reservation, like the Nambe Reservation in the *Shupe* case, and unlike the Navajo Reservation, is located completely within the State of New Mexico. There are no findings in the *Mescalero* case concerning confinement of the foreign corporations and their employees on the Mescalero Reservation during the course of the construction projects. It is the position of TIFFANY CONSTRUCTION CO., INC. that the special circumstances concerning the Navajo Reservation, as well as the actual facts in the present case, should distinguish it from the cases cited above, and that these circumstances do not meet the test required for State taxation of a foreign corporation.

2. The assessment of the New Mexico Gross Receipts Tax against TIFFANY CONSTRUCTION CO., INC. is in violation of the Treaty of 1868 between the United States of America and the Navajo Tribe of Indians because this tax interferes with the Navajos' self-government, as granted by said Treaty, and infringes on their right to make their own laws and be ruled by them.

This Court, in *McClanahan v. State Tax Commissioner of Arizona,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed. 1179 (1973) stated that:

> "The question has always been whether the State action infringed on the right of reservation Indians to make their own laws and be ruled by them." See *Williams v. Lee,* 358 U. S. 217, 79 S.Ct. 269, 3 L. Ed. 2d 251 (1959).

The present case presents the question of whether the New Mexico Gross Receipts Tax levied on a non-Indian contractor, which has contracted with the Tribe and the Bureau of Indian Affairs to construct a road project, burdens the Indians to such an extent that it inteferes with the Navajos' self-government as granted by the Treaty of 1868.

The Treaty of 1868 provided, in return for the Navajos' promise to keep peace, that a portion of the Navajos' native country be "set apart" for "their permanent home" and that no one, except United States government personnel, was to enter the Reservation area. Appendix D, infra at 26, 28. Implied in these Treaty terms was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959).

In the present case, the contract with TIFFANY CONSTRUCTION CO., INC., was negotiated by the Navajo Tribe and the Bureau of Indian Affairs, and was paid for out of tribal funds. In *Mescalero Apache Tribe v. O'Cheskey,* 439 F. Sup. 1063 (D. N. M. 1977), the District Court for New Mexico stated that there is no question that the imposition of a gross receipts Tax upon non-Indian contractors would have an effect upon the tribe, since taxes such as gross receipt taxes, which are taxes on the "seller" of goods and services, are normally passed on to the purchaser. The Court found that the tax is nothing more than an indirect burden on the tribe, citing *Thomas v. Gay,* 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740 (1898). The United States District Court found that the imposition of the gross receipts Tax on non-Indian contractors did not rise to the level of State

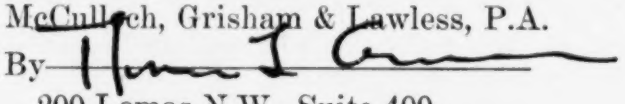
infringement on the right of Reservation Indians to make their own laws and be ruled by them, citing *Williams v. Lee,* supra. 439 F.Supp. 1073. The Court continued that, while it may be that the Tribe has the power to grant the privilege of doing business on the Reservation, it is also true that the state has the power to tax businesses conducted in the state. However, the United States District Court stated that the contractors on the Mescalero Reservation, at the very least, were accorded benefits by and protection from the state as they went to and from the Reservation, Id.

The United States District Court appears to be saying that the Indians' right to make their own laws, and, in the *Mescalero* case, to make contracts with non-Indians, and the state's power to tax non-Indian businesses on Indian Reservations, are not in conflict, at least, when the contractors involved receive benefits from the state. In the present case, a basic governmental function, the building of a road, was the project undertaken by Petitioner. The road, admittedly within the State of New Mexico, and also within the Navajo Reservation, was contracted and paid for by the Navajo Tribe and the Bureau of Indian Affairs, not by the State of New Mexico. The imposition of the New Mexico Gross Receipts Tax increases the cost of a basic governmental function. In the present case, the facts show that the non-Indian foreign contractor which contracted with the Indians received insufficient benefits from the state to offset the burden of taxation imposed upon it, and to justify a concurrent power of both the Tribe and the state over the corporation. The present case should be distinguished from the *Mescalero Apache Tribe v. O'Cheskey* case, and the imposition of the gross receipts tax upon TIFFANY CONSTRUCTION COMPANY, INC., should be considered a violation of the Treaty of 1868, and an infringement on the

right of the Reservation Indians to make their own laws and be ruled by them.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the Opinion of the New Mexico Court of Appeals.

Respectfully submited,
McCulloch, Grisham & Lawless, P.A.
By 
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February 12, 1980

APPENDIX A

IN THE COURT OF APPEALS IN THE
STATE OF NEW MEXICO

TIFFANY CONSTRUCTION CO., INC.
Plaintiff-Appellant,
v. No. 3777
BUREAU OF REVENUE,
STATE OF NEW MEXICO,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY
DONNELLY, Judge

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Attorneys for Appellee

OPINION

LOPEZ, Judge

Plaintiff appeals an adverse judgement in the district court denying its claim for refund of gross receipts taxes. We affirm.

Two issues are raised on appeal: (1) whether plaintiff has waived its right to claim a refund under § 7-1-26, N.M.S.A. 1978 (Supp. 1979) by having already protested and litigated under § 7-1-24 N.M.S.A. 1978 (Supp. 1979) the penalty imposed for failure to pay the New Mexico

Gross Receipts and Compensating Tax; and (2) whether the State of New Mexico can impose this tax on a non-Indian non-resident contractor working exclusively on an Indian reservation in the State.

Tiffany is a non-Indian, Arizona corporation with its principal place of business in Arizona. For approximately one year, it worked on the New Mexico portion of the Navajo Reservation, grading and draining a road. No work was done off the Reservation. The evidence is uncontroverted that all of Tiffany's employees were either residents of Arizona or Navajo Reservation Indians. The Arizona employees always entered and left the reservation through the Arizona side; and they did not use New Mexico health, educational, or law enforcement services. The approximate amount of the construction project was $1,681,740.00. The Bureau of Revenue of the State of New Mexico assessed a tax levy in the amount of $78,583.03 on Tiffany as gross receipts taxes on this project under the State Gross Receipts and Compensating Tax Act. Sections 7-9-1 to 7-9-81, N.M.S.A. 1978.

In June, 1975, Tiffany was informed that it owed $32,343.02 in gross receipts taxes, including a penalty for nonpayment and interest. Plaintiff protested, and an administrative hearing followed, pursuant to § 7-1-24. The Bureau denied plaintiff's protest. This court affirmed its decision in Tiffany Construction Co. v. Bureau of Revenue, 90 N.M. 16, 558 P.2d 1155 (1976), *cert. denied,* 90 N.M. 255, 561 P.2d 1348 (1977). Tiffany paid the tax, penalty, and interest. Thereafter, it paid an additional $46,240.00 in monthly assessments. In November, 1976, Tiffany brough suit in the district court for a refund of $78,583.03, the total amount of gross receipts taxes, including penalty and interest, assessed and paid on its Navajo project.

Because the second issue is dispositive of this appeal, we will diccuss only that issue.

Tiffany's construction work in New Mexico was properly taxed under the New Mexico Gross Receipts and Compensating Tax Act. The imposition of this tax does not violate the Fourteenth Amendment of the United States Constitution. Due process requires a taxable event occur in the state that wishes to impose its tax. Wisconsin v. J. C. Penny Co., 311 U.S. 435 (1940). The taxable event in the instant case is the performance of construction work within the state of New Mexico. Any individual or company performing construction work in this state is subject to gross receipts tax on that work. The Gross Receipts Tax is levied on services performed in New Mexico. Section 7-9-3(F), N.M.S.A. 1978. " 'Service' " includes construction activities . . . ." Section 7-9-3(K), N.M.S.A. 1978. Tiffany has been taxed for having performed construction work in New Mexico. The purpose of the Gross Receipts Tax is "to provide revenue for public purposes by levying *a tax on the privilege of engaging in certain activities* in New Mexico . . . ." (Emphasis added.) Section 7-9-2, N.M.S.A. 1978. A tax on the "privilege of doing business" in a state is Constitutional. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

Being on the New Mexico portion of the Navajo Reservation, Tiffany's entire construction project was located within the boundaries of the state of New Mexico. Although Indian reservations occupy a peculiar position in that they are self-governing entities, they are, nevertheless, part of the state in which they are located. Of the state's power to tax a non-Indian on the Mescalero Reservation, a federal judge wrote:

> While it may be true that the tribe has the power to grant a privilege of engaging in business on the reservation, it is also true that the state has power to tax business conducted in the state. The Mescalero Reservation is not located by itself on another planet. It is situated in New Mexico. . . .

Mescalero Apache Tribe v. O'Chesky, (sic) 439 F. Supp.

1063, 1073 (D. N.M. 1977). The right to vote in New Mexico is predicated upon residency in the state, and reservation Indians are eligible to vote in state elections. Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962). Moreover, construction activities on an Indian reservation are activities within the state for purposes of the Gross Receipts Tax. *See* G. M. Shupe, Inc. v. Bureau of Revenue, 89 N.M. 265, 550 P.2d 277 (Ct.App.), *cert. denied,* 89 N.M. 321, 551 P.2d 1368 (1976); Mescalero Apache Tribe, *supra.* Consequently, while constructing the Navajo road, Tiffany was doing business in the state of New Mexico and was subject to the New Mexico Gross Receipt Tax.

Tiffany claims that it must receive benefits in New Mexico in order for the State to constitutionally impose a tax upon it. It argues that it obtained no benefits from the State and so cannot be taxed. This argument is without merit.

There is substantial evidence in the record to support the trial court's finding that Tiffany enjoyed the use of roads located on the reservation but maintained by the State, and that it benefitted from the New Mexico Environmental Improvement Agency's regulation of air pollution from the Four Corners Power Plant.

Tiffany next contends that, even if it did receive some benefits in New Mexico, the tax imposed is disproportionate to those benefits, and so unconstitutional. This argument, too, is without merit.

The Fourteenth Amendment does not require taxes be levied according to the benefits received by the person or entity taxed. Missouri Pacific Railroad v. Road District, 266 U.S. 187 (1924); *see also* Dane v. Jackson, 256 U.S. 589 (1920).

> A tax is not an assessment of benefits. . . . The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges

> of living in an organized society, established and safeguarded by the devotion of taxes to public purposes . . . . Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government — that it exists primarily to provide for the common good . . . . This court has repudiated the suggestion, whenever made, that . . . [a taxpayer] can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him.

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 522-23 (1937).

Even if Tiffany had received no other benefits from the State, it would be subject to the State tax from the simple fact of having engaged in business here. A tax on the privilege of engaging in business in a state is Constitutional. Brady, *supra.* The lack of benefits argument is frivolous when a company is able, through its presence in a state, to carry on a valuable business there. Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560 (1975).

Tiffany came into New Mexico for its own benefit. It conducted business here worth aproximately $1,681,740.00 and employed 100 persons on this project. It had sufficient minimal contacts with the State to justify the imposition of a state tax. In Standard Steel, *supra,* the United States Supreme Court upheld a state gross receipts tax on a foreign corporation that had only one employee in the state. Tiffany enjoyed the privilege of engaging in business in New Mexico and was properly taxed for this privilege.

The judgment of the district court is affirmed.

IT IS SO ORDERED.

Ramon Lopez
JUDGE

WE CONCUR:
s/Joe W. Wood, C.J.
s/William R. Hendley, J.

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Wednesday, November 14, 1979

NO. 12,783

TIFFANY CONSTRUCTION CO., INC.,
Petitioner,
vs. Original Proceeding on Certiorari
BUREAU OF REVENUE OF THE
STATE OF NEW MEXICO,
Respondent.

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 3777 be and the same is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY
Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT

TIFFANY CONSTRUCTION COMPANY,
INC.,
Plaintiff,
v. No. 52563
BUREAU OF REVENUE,
STATE OF NEW MEXICO,
Defendant.

JUDGMENT

This matter having been tried to the Court without a jury on the 17th day of May 1978, and the Court having heard the evidence and the arguments of counsel, and the Court having entered herein the Decision of the Court, including findings of fact and conclusions of law, and the Court having directed that judgment be entered accordingly.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the Decision of the Court herein filed is hereby adopted and made a part of this judgment by reference in its entirety, and all other proposed findings of fact and conclusions of law not consistent therewith are hereby denied.

2. That all claims of the Plaintiff, and each and every one of them, against the Defendant are hereby dismissed and denied.

THOMAS A. DONNELLY
District Judge

Approved as to Form:
Thomas Grisham
Attorney for Plaintiff
Sarah Bennett
Attorney for Defendant

IN THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO COUNTY OF SANTA FE

TIFFANY CONSTRUCTION CO., INC.
Plaintiff,
vs. No. 52563
BUREAU OF REVENUE,
STATE OF NEW MEXICO,
Defendant.

DECISION OF THE COURT

The Court having heard the evidence and the testimony, and the arguments of Counsel, and having considered the Requested Findings of Fact and Conclusions of Law, now renders the following decision.

FINDINGS OF FACT

1. The Plaintiff, Tiffany Construction Company, Inc., is an Arizona Corporation, having its principal place of business in the State of Arizona, and is a non-Indian entity.

2. The Defendant, Bureau of Revenue of the State of New Mexico is the duly created State agency invested by law within the responsibility for the administration and enforcement of the tax Administration Act and including

3. The Plaintiff Corporation entered into a construction contract dated October 4, 1974 with the Navajo Tribe and the Bureau of Indian Affairs to furnish all labor, equipment, and materials to grade and drain a 20.719 roadway, including the building of culverts, cattle passes and reseeding along the entire project.

4. The approximate amount of the construction contract was $1,681,740.00.

5. The location where the work was performed was entirely in the State of New Mexico and entirely on the Navajo Indian Reservation and began approximately seven

(7) miles south of Shiprock in San Juan County, New Mexico, at a point on U.S. Highway 666 and extended westerly 20.719 miles to the New Mexico Arizona State line near Red Rock, Arizona on the Navajo Reservation.

6. In order to construct the road which was the subject matter of the construction contract, the Plaintiff, Tiffany Construction Company, Inc., and all its employees and its construction equipment entered the State of New Mexico from Arizona on State Highway 504 and traversed south along Highway 666 to its construction site.

7. The plaintiff construction company remained in New Mexico for approximately one year while building the road and completing the contract work.

8. During the course of the said construction project, the Plaintiff obtained no licenses or permits from the State of New Mexico.

9. No New Mexico subcontractors were used on the construction project by the Plaintiff.

10. The Defendant Bureau of Revenue of the State of New Mexico assessed a tax levy in the amount of $78,583.03 upon the Plaintiff construction company as gross receipts taxes and interest under the State Gross Receipts and Compensating Act.

11. Section 72-16A-4 N.M.S.A., 1953 Comp., provides:

> "A. For the privilege of engaging in business, an excise tax equal to four percent of gross receipts is imposed on any person engaging in business in New Mexico.
>
> "B. The tax imposed by this section shall be referred to as the 'gross receipts tax'."

12. In addition to the gross receipts tax and interest assessed against the Plaintiff, the Defendant Bureau of Revenue also assessed a penalty for failure to pay the tax when due.

13. The Plaintiff paid the gross receipts tax immediately but protested the penalty and interest because it asserted it had not negligently failed to pay the tax but took the position the tax was not due and owing.

14. The Plaintiff after protesting the penalty and interest assessed in Assessment No. 140629, later withdrew its protest as to interest.

15. Plaintiff's protest of the penalty assessed by the Defendant was made pursuant to Section 72-13-38 N.M.S.A., 1953 Comp.

16. Formal administrative hearing was held on the protest pursuant to Sec. 72-13-38 N.M.S.A., 1953 Comp., on June 21, 1976, and on July 15, 1976, and a decision and order was issued by the Commissioner of the Bureau of Revenue on August 9, 1976, and the order of the Commissioner held that the penalty was due and owing.

17. The decision of the Commissioner of the Bureau of Revenue was appealed to the Court of Appeals, and the Court entered its opinion upholding the tax penalty in the case of *Tiffany Construction Company, Inc. v. Bureau of Revenue,* 90 N.M. 16, 558 P 2d 1155 (1976), Cert. denied 90 N.M. 255.

18. Initially the Plaintiff chose only to protest the penalty assessed against it by Defendant.

19. Subsequently the Plaintiff sought a refund of the amount of $78,583.03 pursuant to Sec. 72-13-40 N.M.S.A., 1953 Comp., from the Bureau of Revenue on the ground that the provisions of the Gross Receipts and Compensating Tax Act is invalid as applied to the Plaintiff and Defendant denied the refund claim.

20. As to the total sum of $37,583.03 (sic) which the Plaintiff seeks to have refunded to it, $32,343.02 was paid under the Bureau of Revenue Assessment No. 140629, and the sum of 46,240.01 was paid to the Bureau of Revenue by Plaintiff as a self assessment for a tax reporting period

other than that covered by the Bureau's Assessment No. 140629.

21. Tax Assessment No. 140629, assessed by the Bureau of Revenue covered the reporting period of December 1, 1974 through May 31, 1975.

22. The Plaintiff corporation instructed its agents, employees and servants to avoid using available benefits in New Mexico and to stay entirely upon the Navajo Indian Reservation during the term of the construction project.

23. The Plaintiff Tiffany Construction Company, its agents, employees and servants in return for the taxes assessed against it, received substantial benefits from the State of New Mexico and from its laws and services during the period the company was engaged in its construction project in New Mexico, and such benefits specifically included but are not limited to the use of State roads or portions thereof, benefits from state regulation of particulate emissions upon the four corners power plant by the New Mexico Environmental Improvement Agency, the benefit of available protection by the civil and criminal laws of the State of New Mexico, the availability and utilization of hospital and medical services, the inspection and licensing of which are regulated in part by the State of New Mexico, and the use of the State Judicial System, and the Workman's Compensation laws and regulations of the State of New Mexico.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter and the parties hereto.

2. As to the sum of $32,343.02 assessed to Plaintiff by the Defendant under tax Assessment No. 150629, and which the Plaintiff previously protested in part and appealed to the Court of Appeals, as to such sum the prior protest and decision of the Court of Appeals constituted a waiver of Plaintiff's right to seek a refund in the District Court of said amount.

3. As to the remaining amount of the tax assessed in the sum of $46,240.01 by the Defendant, such assessment was valid and correct and constitutes a lawful gross receipts tax imposed for the privilege of engaging in business in New Mexico and deriving gross receipts therefrom.

4. There existed sufficient contracts (sic) by the Plaintiff Tiffany Construction Company, Inc., with the State of New Mexico to allow the Defendant to validly impose the State gross receipts tax upon the Plaintiff corporation, in compliance with fundamental concepts of due process.

5. The Plaintiff corporation received, and was eligible to receive substantial benefits from the State of New Mexico, sufficient to justify the imposition upon it of the State gross receipts tax.

6. The fact that Plaintiff corporation's receipts arose from engaging in business on that portion of the Navajo Indian Reservation located in New Mexico does not deprive the State of New Mexico of jurisdiction to assess the gross receipts tax upon the Plaintiff, nor does it mean that the State conferred no substantial benefits on the Plaintiff corporation, a non-Indian entity.

7. The election by Plaintiff to its agents, employees and servants to minimize contacts with the State of New Mexico and to decline to avail itself of numerous benefits provided by the State should not constitute a valid basis to avoid payment of the State gross receipts tax.

8. Despite the attempt by Plaintiff corporation to minimize contacts with the State of New Mexico, the State did in fact provide substantial benefits to the Plaintiff, and its agents, servants and employees.

9. The provisions of the New Mexico gross receipts tax are not invalid or unconstitutional insofar as it applies to the Plaintiff corporation, a non-Indian entity, under the facts of this case, nor is the State Gross Receipts tax contrary to Article 21, Section 2, of the New Mexico Constitution.

10. The claim of refund of the Plaintiff should be denied, and the relief sought by Plaintiff in the Complaint filed herein should be denied.

All Requested Findings of Fact and Conclusions of Law of the parties, inconsistent with those found or which are not adopted by the Court above, are denied.

THOMAS A. DONNELLY
District Judge

TREATY OF 1868

Treaty between the United State of America
and the Navajo Tribe of Indians;
Concluded June 1, 1868; Ratification advised July 26, 1868;
Proclaimed August 12, 1868 (15 Stat. 667)

ANDREW JOHNSON,
President of the United States of America,

To all and singular to whom these presents shall come, greeting:

WHEREAS a treaty was made and concluded at Fort Sumner, in the territory of New Mexico, on the first day of June, in the year of our Lord, one thousand eight hundred and sixty-eight, by and between Lieutenant-General W. T. Sherman and Samuel F. Tappan, commissioners, on the part of the United States and Barboncito Armijo, and other chiefs and headmen of the Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

ARTICLES of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo Nation or tribe of Indians, represented by their chiefs and head-men, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and head-men being hereto subscribed,) of the other part, witness:

ARTICLE I. From this day forward all war between the parties of this agreement shall forever cease. The Government of the United States desires peace, and its honor is

hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or deprecation upon the person or property of any one, white, black, or Indian subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating or because of his violating, the provisons of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE II. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Cañon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about

109° 30' west of Greenwich, provided it embraces the outlet of the Cañon-de-Chilly, which cañon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

ARTICLE III. The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter-shop and blacksmith-shop, not to cost exceeding one thousand dollars each; and a schoolhouse and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

ARTICLE IV. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE V. If any individual belonging to said tribe,

or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land-book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possessíon of the same as above directed.

For each tract of land so selected a certifcate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo Land-book."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted especially of such of them as may be settled on said agricultural parts of this reservation, and they there-

fore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

ARTICLE VIII. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on the first day of September of each year for ten years, the following articles to wit:

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian—each Indian being encouraged to manufacture their own clothing, blankets, etc.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the

agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE IX. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agre:

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2d. That they will not interfere with the peaceful con-

struction of any railroad not passing over their reservation as herein defined.

3d. That they will not attack any persons at home or traveling, nor molest or disturb any wagon-trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlement women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon-roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the Government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissions to be a chief or head-man of the tribe.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE X. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three-fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article (5) of this treaty.

ARTICLE XI. The Navajos also hereby agree that at

any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE XII. It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as folows, subject to any condition provided in the law, to wit:

1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

2d. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

3d. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the Tribe to revert to the proper agent.

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent setlement elsewhere, reserving the right to hunt on the lands adjoining the said

reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. Sherman
Lt. Gen'l., Indian Peace Commissioner.

S. F. Tappan,
Indian Peace Commissioner.

Barboncito, *Chief.*	his x mark
Armijo	his x mark
Delgado.	his x mark
Manuelito.	his x mark
Largo.	his x mark
Herrero.	his x mark
Chiqueto.	his x mark
Muerto De Hombre.	his x mark
Hombro.	his x mark
Narbono.	his x mark
Narbono Segundo.	his x mark
Gando Mucho.	his x mark

COUNCIL:

Riquo.	his x mark
Juan Martin.	his x mark
Serginto.	his x mark
Grande.	his x mark
Inoetenito.	his x mark
Muchachos Mucho.	his x mark
Chiqueto Segundo.	his x mark
Cabello Amarillo.	his x mark
Francisco.	his x mark
Torivio.	his x mark
Desdendado.	his x mark
Juan.	his x mark
Guero.	his x mark
Gugadore.	his x mark
Cabason.	his x mark
Barbon Segundo.	his x mark
Cabares Colorados.	his x mark

Attest:

Geo. W. G. Getty
Col. 37th Inf'y, Bt. Maj. Gen'l U.S.A.

B. S. Roberts,
Bt. Brg. Gen'l U.S.A., Lt. Col. 3d Cav'y.

J. Cooper McKee,
Bt. Lt. Col. Surgeon U.S.A.

Theo. H. Dodd,
U.S. Indian Ag't for Navajos.

Chas. McClure,
Bt. Maj. and C.S.U.S.A.

James F. Weeds,
Bt. Maj. and Asst. Surg. U.S.A.

J. C. Sutherland,
Interpreter.

William Vaux,
Chaplain, U.S.A.

Supreme Court, U. S.
FILED
MAR 12 1980
MICHAEL RODAK, JR., CLERK

No. 79-1242

IN THE

Supreme Court of the United States

October Term, 1979

TIFFANY CONSTRUCTION CO., INC.,
Petitioner,

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENT IN OPPOSITION

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March 13, 1980

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IN THE

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the district court for Santa Fe County is unreported and appears at Appendix C of the Petition. The opinion of the Court of Appeals of the State of New Mexico is reported at the State Bar of New Mexico Bulletin and Advance Opinions, Volume 18, No. 50, December 13, 1979, and appears at Appendix A of the Petition. The New Mexico Supreme Court denied in an unreported order the Petitioner's Petition for a writ of certiorari, which appears at Appendix B of the Petition.

JURISDICTION

This Court is without jurisdiction to review the questions posed by Petitioner. Questions (i) and (ii) assume facts not found by the courts below, and thus Petitioner is seeking to have this Court review the decisions of the New Mexico courts on questions of fact. Question (iii) seeks review by this Court of a question which was not adequately presented or argued and was not decided by the New Mexico courts below.

QUESTIONS PRESENTED

The questions presented by Petitioner are improper. Questions (i) and (ii) misstate the record and findings of the District Court below, which findings were affirmed by the New Mexico Court of Appeals.

Question (i) poses the question of the legality of the imposition of New Mexico's tax on Petitioner's construction activities on the Navajo Reservation within the State of New Mexico when Petitioner's employees "never enter non-Indian land in the State of New Mexico." (Petition, p. 2) The record does not support this statement, nor did the New Mexico courts make factual findings to support the statement.

Question (ii) frames the question of the legality of the imposition of New Mexico's tax on Petitioner where Petitioner "receives no benefits from the State of New Mexico." (Petition, p. 2) The trial court found that Petitioner received substantial benefits from the State of New Mexico. (finding of fact, No. 23, Petition, App. C., p. 23) This finding was reviewed and upheld on appeal. (Petition, App. A, pp. 15, 16)

Questions (i) and (ii) implicitly seek this Court's review of the substantiality of the evidence underlying the decisions

below. The respondent urges this Court to decline review of these questions.

Question (iii) raises the sovereignty of the Navajo Tribe as a basis for striking down New Mexico's tax. This Court lacks jurisdiction to decide this question because it was never litigated or decided by the courts below. Additionally, Petitioner lacks standing to raise this issue.

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

The pertinent constitutional provision (United States Constitution, Amendment XIV, §1) and the treaty involved (Treaty of 1868 between the United States of America and the Navajo Tribe of Indians) are set forth in the Petition at page 3 and Appendix D (pp. 26-35) respectively.

STATEMENT OF THE CASE

Petitioner, Tiffany Construction Company, Inc., ("Tiffany") is an Arizona corporation with its principal office in Phoenix, Arizona. Tiffany is a registered taxpayer with the New Mexico Taxation and Revenue Department (Tr. Proc. 34), the successor agency to the Respondent New Mexico Bureau of Revenue.

On October 4, 1974, Petitioner entered into a contract with the United States of America, Department of Interior, Bureau of Indian Affairs, to grade and drain 20.719 miles of roadway on the Navajo Reservation. The section of road involved is located entirely within the borders of the State of New Mexico. Under its contract Petitioner was required to furnish all labor, materials and equipment necessary to perform the contract. During the performance of the contract, Petitioner had approximately 100 employees working in New Mexico (Tr.

Proc. 54) Petitioner also had at least 20 large pieces of construction equipment on the job site in New Mexico. (Tr. Proc. 55) Petitioner maintained this presence in New Mexico for approximately one year, during the course of the performance of the contract. (Tr. Proc. 54) Petitioner's employees and equipment were transported into New Mexico to the construction site via New Mexico Highway 504 and U.S. Highway 666. (Tr. Proc. 56) Both New Mexico Highway 504 and U.S. Highway 666 are maintained by the State of New Mexico. (Tr. Proc. 145, 147)

Petitioner paid the State of New Mexico, Bureau of Revenue, $78,583.03 in gross receipts taxes and interest, based upon its receipts from the construction project performed in New Mexico. Petitioner sought a refund of these taxes in the New Mexico courts. The New Mexico Court of Appeals found that Petitioner had received at least three benefits from New Mexico: The use of roads maintained by New Mexico; the protection of New Mexico's regulation of air pollution from the Four Corners Power Plant; and receipt of the privilege of engaging in business in New Mexico. (Petition, App. A, pp. 15, 16) Thus the court found that Tiffany received sufficient benefits to uphold the taxes imposed.

In its Statement of the Case, Tiffany cites many irrelevant facts and misstates others. Tiffany claims that it is not licensed or authorized to do business in New Mexico. However, it is a registered taxpayer. (Tr. Proc. 34) The fact that Tiffany disregarded other New Mexico statutory requirements for licensing is irrelevant and should not be regarded as a point to Tiffany's credit to show lack of contact or benefit from the State of New Mexico.

Petitioner attempts to enhance the Indian aspect of this case by stating that the Navajo Tribe was also a party to the road construction contract. (Petition, pp. 3, 4) This is contrary to

the affidavit and the testimony of their own comptroller, Ted Skowronek. (Affidavit of Skowronek, pgf. 11, Tr. Rec. 56, Tr. Proc. 36) This is also contrary to Petitioner's proposed finding of fact, No. 21. (Tr. Rec. 67)

Tiffany seeks to mislead this Court by its assertion that it received no benefits from the State of New Mexico. (Petition, p. 5) Benefits were shown below and incorporated in the decisions of both the trial court (finding of fact, No. 23, Petition, App. C, p. 23) and the New Mexico Court of Appeals. (Petition, App. A, pp. 16, 17) There was substantial evidence to support these holdings.

Tiffany states that its employees were either Arizona residents or Navajo Indians. (Petition, p. 4) While this statement is not challenged by the Respondent, the implication that Tiffany's employees had no relation to New Mexico is challenged. There is no evidence to show that Tiffany's Navajo employees were not also New Mexico citizens. Tiffany also overstates the evidence when it claims that its Arizona employees never left the Navajo Reservation. (Petition, p. 4) Tiffany's comptroller testified that: he did not know if every Tiffany employee spent every night in the camper trailers on the construction site; (Tr. Proc. 55); he did not know if employees left the job site at night (Tr. Proc. 57); and that Tiffany did not require employees to report what they did on their personal time. (Tr. Proc. 66)

ARGUMENT

I. THIS COURT SHOULD DECLINE TO DECIDE THE QUESTION OF WHETHER NEW MEXICO'S TAXATION OF PETITIONER'S GROSS RECEIPTS FROM A CONSTRUCTION PROJECT PERFORMED ON THE NAVAJO RESERVATION INTERFERES WITH THE RIGHT OF THE NAVAJOS TO MAKE THEIR OWN LAWS AND BE GOVERNED BY THEM.

A. This Court lacks jurisdiction under 28 U.S.C.A. §1257(3) to review the above question, hereinafter referred to as the Indian sovereignty question, because the question was not properly raised in the New Mexico courts.

The jurisdiction of this court is invoked under 28 U.S.C.A. §1257(3). (Petition, p. 2) This section, which defines this Court's certiorari jurisdiction, provides for review of final judgments or decrees rendered by the highest state court where:

> "Any title, right, privilege or immunity is *specially set up or claimed* under the constitution, treaties or statutes of, or commission held or authority exercised under the United States." (Emphasis added.)

The Indian sovereignty issue was not properly set up, claimed or decided by the highest New Mexico court in which the decision could be had. Although the record reveals that the Indian sovereignty issue was raised in Petitioner's complaint as Count III (Tr. Rec., 2), no evidence was presented at trial on this issue. Additionally, the trial court did not specifically decide this question. (Decision of the district court for Santa Fe County, Petition, Appendix C).

Even if this Court found that the issue was sufficiently raised in the district court, it was abandoned by Petitioner in its appeal to the New Mexico Court of Appeals. This is clear, even from the Petition, where Petitioner correctly set forth the issues on appeal to the New Mexico Court of Appeals. (Petition, pp. 5, 6) Nowhere is the Indian sovereignty issue listed. Since the sovereignty question was not at issue, the New Mexico Court of Appeals did not decide the issue in its opinion. (Petition, Appendix A)

In construing 28 U.S.C.A. §1257(3), Mr. Justice Harlan stated:

> "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional. *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U.S. 308, 334 (1968) (dissent)."

This position follows a long line of well established authority. *Cardinale v. Louisiana,* 394 U.S. 437 (1969); *Safeway Stores v. Oklahoma Grocers,* 360 U.S. 334 (1959); *Adler v. Board of Education,* 342 U.S. 485 (1952); *State Farm Mutual Insurance Co. v. Duel,* 324 U.S. 154 (1945); *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 112 (1909); *Bonner v. Gorman,* 213 U.S. 86 (1909); *Dewey v. Des Moines,* 173 U.S. 193 (1899). It is also well established that the federal question must be pursued on appeal to the state courts, as well as being raised at the lower level, or else the question is deemed to have been waived. *Beck v. Washington,* 369 U.S. 541 (1962); *Wilson v. Cook,* 327 U.S. 474 (1946); *Herndon v. Georgia,* 295 U.S. 441 (1935); *Beaty v. Richardson,* 276 U.S. 599 (1927).

In addition to failing to meet the jurisdictional requirements of 28 U.S.C.A. §1257(3), Petitioner has also failed to meet the requirements of the Supreme Court Rules. Rule 23(f) provides:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage and the proceedings in the court of first instance and in the appellate court at which, and in the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . .; and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." U.S. Sup. Ct. Rule 23(f), U.S.C.A.

The petition does not show that the Indian sovereignty issue was raised in or decided by the New Mexico Court of Appeals. Petitioner was unable to comply with this rule simply because this issue was not raised before the New Mexico Court of Appeals.

B. Even should this Court take jurisdiction to decide the Indian sovereignty question, the imposition of New Mexico's gross receipts tax on a non-Indian contractor does not violate Indian sovereignty.

The record is bare of any evidence that New Mexico's gross receipts tax would in any way infringe on the Navajo Tribe's right to make their own laws and be governed by them under the circumstances of this case. Although the construction project occurred on the Navajo Reservation, there is no evidence that Navajo money financed the project. The Navajo Tribe was not a party to the contract. (Affidavit of Ted Skowronek, pgf. 11, Tr. Rec. 56, Tr. Proc. 36) In fact, Petitioner agrees that the project was entered into solely with the United States of America. (Plaintiff's proposed finding of fact, No. 21, Tr. Rec., p. 67)

Even if the Navajos were a party to the contract, however, there would still be no infringement on Navajo sovereignty. This is because the legal incidence of New Mexico's gross receipts tax is on the person who sells goods or performs services. Sections 7-9-4, 7-9-3(E) and 7-9-3(K) NMSA 1978, *United States v. State of New Mexico,* 581 F.2d 803 (10th Cir. 1978); *Mescalero Apache Tribe v. O'Cheskey,* 439 F.Supp. 1063 (D.N.M. 1977), *appeal pending* (10th Cir. No. 77-2102). These holdings are in accord with the developed case law on the subject. *United States v. County of Fresno,* 429 U.S. 452 (1977); *Diamond National v. State Equalization Board,* 425 U.S. 268 (1976); *Gurley v. Rhoden,* 421 U.S. 200 (1975);

Agricultural Bank v. Tax Commission, 392 U.S. 339 (1968).

There is no showing that the economic burden of the gross receipts taxes imposed upon Petitioner is borne by the Navajo Tribe in this case. Even if such a showing were made, Petitioner could not prevail in this argument. Where the legal incidence, as opposed to the economic burden, of a state's tax is on a non-Indian on a reservation, the tax has been upheld. *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976); *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976); *Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184 (9th Cir. 1971).

Finally, this Court should decline to decide the Indian sovereignty issue in this case because this is an inappropriate case in which to render such a decision. In the first place, Petitioner is a non-Indian entity. It has no standing to raise the rights of the Indians to make their own laws and be governed by them. *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970); *Hanson v. Denckla,* 357 U.S. 235 (1958); *Barrows v. Jackson,* 346 U.S. 249 (1953); *Tileston v. Ullman,* 318 U.S. 44 (1943). The Navajo Indians are not a party to this litigation. If Indian sovereignty is an issue in this case, then surely, the Indians have the greatest interest in protecting it. Additionally, the record in this case is inadequate for the reason that this issue was not argued below. There is no evidence in the record to show how Indian sovereignty is or is not affected by New Mexico's tax in the circumstances of this case.

II. THE NEW MEXICO COURT OF APPEALS CORRECTLY DENIED PETITIONER'S CLAIM THAT THE IMPOSITION OF NEW MEXICO'S GROSS RECEIPTS TAX UPON IT UNDER THE CIRCUMSTANCES OF THIS CASE CONSTITUTES A DENIAL OF DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. This Court should decline to review the factual determinations of the New Mexico courts regarding Petitioner's due process claims.

Petitioner's due process claims assume facts not found by the New Mexico courts below. Question (i) assumes that Tiffany's employees never entered any portions of New Mexico not located on the Navajo Reservation. Question (ii) assumes that Tiffany received no benefits from the State of New Mexico. The general policy of this Court has been that it will not reexamine the state court's findings of fact. *Fry Roofing Co. v. Wood,* 344 U.S. 156, 160 (1952); *Grayson v. Harris,* 267 U.S. 352, 358 (1925); *Portland R., L. & P. Co. v. Railroad Commissioner,* 229 U.S. 397, 412 (1913). The New Mexico court's findings are supported by substantial evidence and therefore this Court should decline to review them.

B. Even should this Court review Petitioner's due process claims, the imposition of New Mexico's gross receipts tax does not deny the Petitioner due process under the facts of this case.

Tiffany's due process argument can be broken down into two parts. It argues that there is insufficient nexus with New Mexico and that it received insufficient benefits from New Mexico to be subject to taxation by New Mexico.

The requirements of due process are met in this case. Due process requires only that there exist sufficient nexus between the taxing state and the entity taxed to allow the tax, and that the tax be fairly related to the benefits and opportunities provided by the taxing state. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977).

Petitioner claims insufficient nexus by virtue of the fact that it is a foreign corporation, not licensed to do business in

New Mexico, doing work on a part of the Navajo Reservation in New Mexico, and it never entered any part of New Mexico off of the Navajo Reservation. (Petition, p. 7) Even if its claim that its employees confined themselves to the Navajo Reservation were properly based on the findings of the court below, it is irrelevant. The Court of Appeals found that substantial benefits were derived by Petitioner and its employees in that they traveled on roads maintained by the State of New Mexico, benefitted from state air pollution controls on the nearby Four Corners generating station, and enjoyed the privilege of engaging in business in New Mexico. (Petition, App. A, pp. 15, 16)

Apparently Petitioner is urging on this court a standard that would require examination in each case of the comings and goings of a construction company's employees in order to determine whether they entered a job site through a neighboring state or through the state in question. Such a standard is not based on the developed law of due process in the taxing field and if it were to be adopted by this court would cause expensive and protracted litigation in order to factually determine in each case the movements of construction employees. Finally, this argument completely ignores that the construction project which gave rise to the tax occurred wholly within the territorial boundaries of the State of New Mexico.

Petitioner's argument also ignores the fact that during the course of the construction project lasting approximately one year, it had approximately 100 employees (Tr. Proc. 54) and at least 20 large pieces of construction equipment (Tr. Proc. 55) located on the job site in New Mexico, generating revenue for Petitioner. This court stated in *National Geographic Society v. California Board of Equalization,* 430 U.S. 551, 557 (1977):

> "Standard Pressed Steel [*Standard Pressed Steel Co. v. Department of Revenue of Washington,* 419 U.S. 560 (1975)], held that maintenance in the taxing state of a

> single employee . . . established a sufficient relation to activities within the state producing the gross receipts as to support imposition of the tax."

If the presence of a single employee in the taxing state constitutes sufficient nexus, surely the presence of 100 employees and a substantial amount of valuable property used in New Mexico to generate revenue for its employer or owner constitutes a sufficient nexus for New Mexico to impose its gross receipts tax.

Petitioner also argues that it receives insufficient benefits from New Mexico to justify imposition of the gross receipts tax. The due process test in this regard was succinctly stated by this court in *State of Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940),

> "The simple but controlling question is whether the state has given anything for which it can ask return." 311 U.S. 444.

The record reflects numerous benefits which were provided or were available to Petitioner from the State of New Mexico. There was testimony that Tiffany used a portion of New Mexico Highway 504 to transport both its equipment and employees. (Tr. Proc. 56) Highway 504 is maintained by the State of New Mexico at a cost of $250 to $300 a mile per year. (Tr. Proc. 145) There was also evidence that Tiffany used U.S. Highway 666. (Tr. Proc. 46) New Mexico also maintains that highway. (Tr. Proc. 147) Additionally, the state produced evidence that it provided benefits to Tiffany and its employees through its adoption and enforcement of air quality emissions standards at the nearby Four Corners Power Plant. (Testimony of Cubia Clayton, Tr. Proc., pp. 98-124) There was also testimony that the State of New Mexico licenses and inspects the hospitals on the Navajo Reservation. (Tr. Proc. 78) There was testimony that the State of New Mexico licenses and inspects the hospitals on

the Navajo Reservation. (Tr. Proc. 78) There was testimony that some of the Navajo police receive law enforcement training at the New Mexico State Police Academy (Tr. Proc. 78, 79), and that under some circumstances New Mexico's criminal laws apply to crimes committed upon the Navajo Reservation. (Tr. Proc. 79) There was testimony that the state provides public schools for both Indians and non-Indians on the Navajo Reservation. (Tr. Proc. 69)

There was evidence of activity on Petitioner's part to avoid using other benefits which were available to it. In fact, Tiffany was so concerned that its employees might be benefitted by the State of New Mexico that it carefully instructed them how to enter the New Mexico side of the reservation so as to only enter New Mexico within the boundaries of the Navajo Reservation. (Tr. Proc. 46) Tiffany provided unemployment and workman's compensation coverage through the State of Arizona. (Tr. Proc. 57, 64) Tiffany was bonded in Arizona. (Tr. Proc. 37, 39) It used no New Mexico subcontractors on the project. (Tr. Proc. 49) However, the fact that Petitioner chose not to avail itself of these benefits, which were available to it in New Mexico, in no way detracts from the availability of these benefits. In short, there was ample evidence in the record to support the conclusion of the courts in New Mexico that the State of New Mexico did provide benefits and the protection of its laws to Tiffany.

It is also no defense that the benefits Tiffany did receive cannot be tied, dollar for dollar, to the taxes levied. Due process does not require this. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *Missouri Pacific Railroad v. Road District*, 266 U.S. 187 (1924).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Supreme Court Rules, I certify that the foregoing Brief for Respondent in Opposition was served on opposing counsel by mailing three copies by United States mail, postage prepaid, to Thomas L. Grisham, Attorney for Tiffany Construction Company, Inc., 200 Lomas, N.W.– Suite 400, Albuquerque, New Mexico 87102.

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